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IN THE
COURT OF APPEALS OF INDIANA

RONALD THRASH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0610-PC-455
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas Stefaniak, Judge
Cause No. 45G04-0011-CF-222;
45G04-0209-PC-8

May 17, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Ronald Thrash (Thrash), appeals the post-conviction court's denial of his Petition for Post-Conviction Relief.

We affirm.

ISSUE

Thrash raises one issue on appeal, which we restate as follows: Whether Thrash received ineffective assistance of his trial counsel.

FACTS AND PROCEDURAL HISTORY

On November 7, 2000, Thrash shot Corey Frazier (Frazier) outside a home in Lake County, Indiana.[1] Thrash continued discharging his gun even after Frazier fell to the ground. Brian Patterson, a friend of both Thrash and Frazier, was present during the shooting but did not see anyone shoot a gun. Michelle Tyler and Chawauna Moody heard a gun shot in the distance and saw Thrash repeatedly shoot Frazier. Christopher Moody also saw Thrash shoot Frazier.

The Gary Police Department was called as a result of the shootings. By the time Officers Robert Irving (Officer Irving) and Larry Robertson (Officer Robertson) arrived at the scene a crowd had assembled. Some people in the crowd pointed to Thrash, who was walking away from the scene, and identified him as the shooter. Officer Robertson called after Thrash, identifying himself as a police officer and ordered Thrash to stop. Thrash looked back and ran away from the officers. Both officers pursued Thrash. They

[1] The Certificate of Death spells the victim's last name "Frazier," although it is spelled "Fraizer" in the Transcript. (Exhibit p. 29). We will use the spelling on the Certificate of Death.

eventually caught Thrash and found a 9mm Glock in his possession with a magazine that held sixteen rounds, but had only two rounds in the magazine and one in the chamber. The officers also found an additional magazine, which held sixteen rounds, in Thrash's pocket.

An autopsy was performed on Frazier. He was shot a total of thirteen times in the head, chin, chest, and forearms. He died as a result of the gunshot wounds. It was determined that twelve of the fourteen spent cartridge casings found at the scene had been fired from the gun found in Thrash's possession.

On November 9, 2000, the State filed an Information charging Thrash with murder, a felony, Ind. Code § 35-42-1-1. On May 7 through 9, 2001, a jury trial was held. After all the evidence was presented, Thrash was found guilty as charged. On June 28, 2001, Thrash was sentenced for his murder conviction. Finding three aggravating circumstances and no mitigating circumstances, the trial court sentenced Thrash to fifty-eight years and ordered the sentence to be served consecutively to his sentence under Cause Number 45G04-9907-CF-00115.

On June 30, 2001, Thrash filed his Notice of Appeal, but then filed a Motion for Stay and Remand on January 21, 2002. The court of appeals granted his Motion and dismissed the appeal without prejudice. On September 20, 2002, Thrash filed a Petition for Post-Conviction Relief claiming ineffective assistance of counsel for failure to (1) "call [Thrash] as a witness at trial;" (2) "request a jury instruction on voluntary manslaughter;" and (3) "present evidence that [Thrash] lacked the culpability necessary to commit the felony of murder due to intoxication at the time of the offense."

(Appellant's Appendix pp. 85-86). On June 22, 2005, a post-conviction hearing was held. The post-conviction court took the matter under advisement and on August 2, 2006, issued the following conclusions of law:

CONCLUSIONS OF LAW

1. Petitions for post-conviction relief are quasi-civil in nature and the petitioner bears the burden of proving the claims raised therein by a preponderance of the evidence. [Post-Conviction Rule] 1(5); [*s*]*ee also*[] *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001).

2. A court of review judges the effectiveness of trial counsel by the standard expressed in *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674 (1984). The question on review is whether counsel's performance fell below prevailing professional norms and if so, whether the substandard performance prejudiced the petitioner. To prove the prejudice prong of this analysis, the petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lambert v. State*, 743 N.E.2d 719, 730-31 (Ind. 2001).

3. Counsel [is] presumed competent, and this presumption must be overcome by strong and convincing evidence. *Martin v. State*, 744 N.E.2d 574, 578 (Ind. [Ct.] App. 2001). The court held that "isolated poor strategy, inexperience, or bad tactics do not necessarily amount to ineffective assistance of counsel. []The judicial scrutiny of counsel's performance is highly deferential and should not be exercised through the distortions of hindsight." *Id.*

4. [Thrash] claims that the trial court violated his right to due process by failing to instruct the jury on voluntary manslaughter as a lesser included offense of murder. Relatedly, he claims trial counsel [was] ineffective for failing to tender a proposed voluntary manslaughter instruction.

5. To determine whether an instruction on a lesser included offense should be given, the trial court must engage in a three-step analysis. The [trial] court must determine: (1) whether the lesser included offense is inherently included in the crime charged; if not, (2) whether the lesser included offense is factually included in the crime charged;

and, if either inherently or factually included, then (3) whether a serious evidentiary dispute exists between the element or elements distinguishing the lesser offense from the charged offense whereby the jury could conclude the lesser offense was committed but not the greater. *Wright v. State*, 658 N.E.2d 563 (Ind. 1995).

6. There was no evidence at trial of "sudden heat." Although witnesses testified to a fight some weeks or months earlier, the evidence also indicated that the dispute was resolved and [Thrash] and [Frazier] remained friends. There was no evidence of any dispute on the day in question. Therefore, the evidence did not support a finding of a serious evidentiary dispute between the element distinguishing voluntary manslaughter from a knowing or intentional killing. Because the evidence does not support giving a voluntary manslaughter instruction, counsel did not err in failing to tender one[,] nor did the [trial] court err by failing to *sua sponte* instruct on voluntary manslaughter.

7. [Thrash] claims counsel [was] ineffective for failing to investigate, locate and present witnesses to show that [he] used deadly force justifiably to prevent serious bodily injury to himself or a third person. [Thrash] failed to present any witnesses to substantiate this claim and thereby fails to meet his burden of proof.

8. [Thrash] claims counsel [was] ineffective for failing to present evidence that he lacked the culpability necessary to commit murder due to his intoxication. In order for [Thrash] to establish the defense of voluntary intoxication, he would have had to establish that he was so intoxicated that he could not form the requisite intent to commit the offense. *Timberlake v. State*, 753 N.E.2d 591, 606 (Ind. 2001). "Evidence that the defendant could plan, operate equipment, instruct the behavior of others, carry out acts requiring physical skill, disengage and leave the scene, and find his way to a friend's home seeking aid show that his intoxication was not so great as to relieve him from responsibility for his acts." *Id.* [(]citing *Hughett v. State*, 557 N.E.2d 1015, 1017-18 (Ind. 1990)[)]. Trial counsel testified that such a defense would not have been successful in his opinion because [Thrash] did not have a diminished capacity as evidenced by the fact that he fled the scene with the handgun after the fatal shooting. He then tried to escape capture by the police officers when he was acknowledged by the crowd as the shooter. Furthermore, counsel has found this defense to be successful in only one case over twenty-eight

years of criminal defense practice. We conclude that the decision to forego this defense was strategic.

9. [Thrash] claims counsel [was] ineffective for failing to call [him] as a witness [o]n his own behalf at trial. [Thrash] claims that he was prejudiced by failing to testify because the jury was prevented from considering either self-defense, voluntary intoxication or a lesser included offense such as involuntary manslaughter or reckless homicide. [Thrash] claims that he is not guilty of the offense due to his intoxication at the time of the shooting. Counsel and [Thrash] discussed the pros and cons of testifying and jointly decided it was not in [Thrash's] best interest to take the stand. We conclude that counsel cautioned his client about the dangers associated with testifying. We do not find that he misled his client in this regard.

10. Based on the evidence presented, we conclude that counsel's performance did not fall below prevailing professional norms. [Thrash] was not denied the effective assistance of counsel.

(Appellant's App. pp. 157-59) (some internal citations omitted).

Thrash now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Thrash claims the post-conviction court erred in denying his Petition for Post-Conviction Relief. Specifically, Thrash argues his trial counsel was ineffective for failing to (1) call him as a witness at trial; (2) request a voluntary manslaughter jury instruction; and (3) present evidence that he lacked the culpability necessary to commit murder due to intoxication at the time of the offense.

Post-conviction hearings do not afford defendants the opportunity for a "super appeal." *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. Thrash has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); s*ee also id.* Because

Thrash is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole leads us unerringly and unmistakably to believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003); s*ee also Moffitt*, 817 N.E.2d at 248. It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that a decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution. *Taylor v. State*, 840 N.E.2d 324 (Ind. 2006). "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id*. at 331 (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984), *reh'g denied*). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. When called upon to find whether there was ineffective assistance of trial counsel, we use the analysis outlined by the Supreme Court in *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's

> errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999), *reh'g denied*, *cert. denied*, 529 U.S. 1113 (2000).

Trial counsel is given wide discretion in determining strategy and tactics, and therefore appellate courts will accord those decisions deference. *McCann v. State*, 854 N.E.2d 905, 909 (Ind. Ct. App. 2006). Additionally, we note that counsel's conduct is assessed based on facts known at the time and not through hindsight; and rather than focusing on isolated instances of poor tactics or strategy in the management of a case, the effectiveness of representation is determined based on the whole course of attorney conduct. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997), *reh'g denied*, *cert. denied*, 523 U.S. 1079 (1998).

Thrash first argues his trial counsel rendered ineffective assistance by failing to call him as a witness at trial. Specifically, Thrash avers that his trial testimony would have created one of three situations: (1) jury instructions on self-defense, (2) jury instructions on a lesser included offense, *i.e.* involuntary manslaughter or reckless homicide, or (3) the ability to claim self-defense. We will address Thrash's jury instruction and self-defense arguments later in this opinion. With respect to the decision that Thrash not testify, "a reviewing court must grant the trial attorney significant deference in choosing a strategy which . . . he or she deems best." *Potter v. State*, 684

N.E.2d 1127, 1133 (Ind. 1997). In this case, Thrash's attorney explained at the post-conviction hearing that he was not entirely sure why he decided not to call Thrash as a witness, but that he was probably concerned that either Thrash "would not be able to stand up under cross-examination," or his testimony would hurt him at sentencing. (Transcript p. 28). "Tactical choices by trial counsel do not establish ineffective assistance of counsel even though such choices may be subject to criticism . . . ." *Smith v. State*, 689 N.E.2d 1238, 1244 (Ind. 1997). Thus, Thrash has failed to establish his trial counsel was deficient for failing to call him as a witness during trial. *See id.*

Thrash also argues his trial counsel was ineffective for failing to request a voluntary manslaughter jury instruction. Voluntary manslaughter defined as:

> (a) A person who knowingly or intentionally:
>
> (1) kills another human being; or
>
> (2) kills a fetus that has attained viability (as defined in IC 16-18-2-365); while acting under sudden heat commits voluntary manslaughter, a Class B felony. However, the offense is a Class A felony if it is committed by means of a deadly weapon.
>
> (b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1(1) of this chapter to voluntary manslaughter.

I.C. § 35-42-1-3. "Voluntary manslaughter is an inherently included lesser offense of murder." *Washington v. State*, 808 N.E.2d 617, 625 (Ind. 2004).

At Thrash's post-conviction relief hearing, his trial counsel could not remember exactly why he had not requested a voluntary manslaughter instruction. However, evidence was presented at trial that while Thrash and Frazier engaged in an altercation months before the instant offense, they were amicable up to the day of Frazier's death.

Thus, the evidence of sudden heat or provocation presented at trial relating to a fight was weak and we cannot say counsel's representation was deficient for failing to pursue such a thin argument. And, since "[a] tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense," we find Thrash has still yet to established ineffective assistance of trial counsel. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998).

Lastly, Thrash argues his trial counsel was ineffective for failing to present evidence that he lacked the culpability necessary to commit murder due to his intoxication at the time of the offense. However, as the State points out and as discussed in *Sanchez v. State*, 749 N.E.2d 509 (Ind. 2001), voluntary intoxication was not a defense available to Thrash, neither when he committed the instant offense in 2000, or when he was tried in 2001. In 1997, the General Assembly repealed I.C. § 35-41-3-5(b), which stated: "Voluntary intoxication is a defense only to the extent that it negates an element of an offense referred to by the phrase 'with intent to' or 'with an intention to.'" Now, I.C. § 35-41-3-5 states:

> It is a defense that the person who engaged in the prohibited conduct did so while he was intoxicated, only if the intoxication resulted from the introduction of a substance into his body:
>
> (1) without his [or her] consent; or
>
> (2) when he [or she] did not know that the substance might cause intoxication.

Here, Thrash voluntarily smoked marijuana laced with embalming fluid. Thus, Thrash's trial counsel could not have been ineffective for failing to present evidence that he lacked the culpability necessary to commit murder due to his voluntary intoxication at the time of the offense.

Additionally, our review of the record indicates such overwhelming evidence of guilt was presented at trial that the outcome would not have been different but for the actions of Thrash's trial counsel. *See Lambert v. State*, 743 N.E.2d 719, 730-31 (Ind. 2001), *reh'g denied*, *cert denied*, 534 U.S. 1136 (2002). Four eyewitnesses testified they saw Thrash shoot Frazier multiple times. Thrash ran from the police and when he was apprehended was found in possession of a handgun. And, after tests, it was determined the handgun found on Thrash's person was the same handgun used to shoot Frazier. Therefore, whether or not Thrash's counsel used ideal facts, the outcome was likely to be the same.

CONCLUSION

Based on the foregoing, we find that Thrash did not meet his burden of establishing he received ineffective assistance of trial counsel. Thus, the post-conviction court properly denied Thrash's Petition for Post-Conviction Relief.

Affirmed.

NAJAM, J., and BARNES, J., concur.